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June 27, 1994

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: GN Docket No. 94-33
American Mobile Telecommunications Association, Inc.

Dear Mr. Caton:

On behalf of the American Mobile Telecommunications Association, Inc., enclosed herewith please find its Comments in GN Docket No. 94-33.

Kindly refer any questions or correspondence to the undersigned.

Very truly yours,

Elizabeth R. Sachs

ERS:cls

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Further Forbearance from	)	GN Docket No. 94-33
Title II Regulation for Certain Types of	)	
Commercial Mobile Radio Service	)	
Providers	)	
	)	

To: The Commission

COMMENTS OF THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

By: _____

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June 27, 1994

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SUMMARY

The American Mobile Telecommunications Association, Inc. supports the Commission's decision to consider further Title II forbearance for certain classes of CMRS services. The Association recommends that the FCC consider the relative dominance of CMRS providers in its assessment of the need for imposition of various existing and prospective common carrier obligations. AMTA also suggests that the FCC forbear entirely from regulating under Title II non-paging CMRS operators that serve fewer than five thousand subscribers nationwide, as well as those whose service is provided to business rather than individual subscribers.

The Association does not oppose, for the most part, imposition of the specific Title II provisions addressed in the instant proceeding on those CMRS providers for whom total forbearance is not recommended. However, AMTA does request that the Commission not require provision of TRS services by wide-area SMR licensees prior to expiration of the CMRS transition period in August, 1996. It also submits that imposition of LEC TDDRA obligations would constitute an unnecessary regulatory burden on CMRS providers.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Comments in the above-entitled proceeding.[1/] AMTA supports the FCC's decision to consider forebearing from applying specific provisions of Title II of the Communications Act to certain Commercial Mobile Radio Service ("CMRS") providers. NPR ¶ 4. For the reasons described below, the Association believes the public interest will be best served by adoption of a flexible regulatory approach reflective of the actual market presence, and thus market power, of various CMRS services.

I. INTRODUCTION

AMTA is a nationwide non-profit trade association dedicated to the interests of what heretofore had been classified as the private carrier industry. The Association's members include trunked and conventional 800 MHz and 900 MHz SMR operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country, and represent the substantial majority of those private carriers whose systems have been reclassified as CMRS. Because the instant Notice examines the degree of Title II regulation which will be imposed on these reclassified entities, the Association has a profound interest in the outcome of this proceeding.

[1/] Notice of Proposed Rule Making, GN Docket No. 94-33, 59 FR 25432 (May 16, 1994) ("NPR" or "Notice").

II. BACKGROUND

In response to last year's Congressional directive,[2/] the Commission recently classified all mobile radio services as either CMRS or private mobile radio service ("PMRS").[3/] Reclassified private systems will be considered common carriers, and thereby subject to such statutory obligations as are imposed on common carriers by the Communications Act, except to the extent that the FCC forbears from applying them.[4/] The FCC's decision regarding the proper delineation of CMRS versus PMRS eligibles also adopted the statutorily-mandated three-year transition period for the conversion of heretofore PMRS systems to CMRS status. The transition period is applicable to providers of land mobile service before August 10, 1993, including system expansion, modifications or acquisitions of additional licenses in the same service, even if authorized after that date. Because Congress and the FCC properly have established a transition period for conversion, most reclassified CMRS providers will not be subject to the statutory obligations addressed herein until August 10, 1996. However, licensees whose initial authorizations were granted after the August 10, 1993 deadline for transition eligibility will be affected immediately upon the effective date of the rules implementing

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[2/] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat. 312, 392 (1993) ("Budget Act"), to be codified at 47 U.S.C. §§ 303(n), 332.

[3/] Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994) ("2nd R&O").

[4/] Communications Act of 1934 as amended 47 U.S.C. §§ 201 et seq. ("Communications Act" or "Act").

the CMRS transition.[5/] Thus, this proceeding will have an immediate, significant effect on those entities.

The FCC has already made certain determinations regarding CMRS regulation in the 2nd R&O, and has elected to forbear from applying Sections 203, 204, 205, 211, 212 and 214 of Title II of the Act to any CMRS service. While the Commission decided at that time to enforce the other Title II requirements on all CMRS providers, it also announced that it would consider further forbearance for certain classes of CMRS services at a later date, consistent with satisfaction of the three-prong test established in the statute for the exercise of discretion by the agency in this matter. Congress has authorized the FCC to forbear from applying most Title II obligations if it determines that:

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.[6/]

[5/] See Further Notice of Proposed Rule Making, GN Docket No. 93-252 (adopted April 20, 1994, and released May 20, 1994) ("FNPR").

[6/] Communications Act, § 332 (c)(1)(A), 47 U.S.C. § 332 (c)(1)(A). Congress has prohibited the Commission from forbearing from applying Sections 201, 202, and 208 to all CMRS.

Moreover, the legislative history accompanying the statute indicates Congressional recognition that it may be appropriate for the FCC to distinguish among classes of CMRS in reaching these determinations.[7/] The instant NPR is intended to explore that possibility.

III. DISCUSSION

The Commission has already established that there is sufficient competition in the overall CMRS marketplace to permit forbearance from certain of the more burdensome Title II requirements. 2nd R&O ¶¶ 24, 135-54, 162-3, 173-82. In particular, the FCC determined that the number of alternative CMRS service providers justified forbearance from tariffing obligations. 2nd R&O ¶¶ 165-82. The instant Notice addresses the possibility of further forbearance for particular CMRS providers when the FCC can determine that the statutory test outlined above would be met.

The NPR suggests various approaches which might be used to make such an evaluation. First, the Notice considers adoption of a section-by-section analysis. It proposes that in those instances when forbearance meets the first two prongs of the three-part statutory test, the FCC would consider two factors under the third, public interest prong: First, whether there are differential costs of compliance that would make further forbearance appropriate for certain entities; and, second, whether the public interest benefits from applications of specific Title II provisions are less for certain CMRS

[7/] H.R. Conf. Rep. No. 102-213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report").

providers. NPR ¶¶ 5 and 8. Under this approach, each of the remaining Title II obligations would be considered individually. The Commission seeks comment in each case on the above-described cost/benefit assessment associated with the public interest prong of the test, the impact of forbearance on future CMRS competition, the effect, if any, of forbearance on satisfaction of Congressional intent, the effect of forbearance on regulatory symmetry, and other factors which might be considered in analyzing further forbearance. NPR ¶ 8.

Alternatively, the Commission suggests that different methodologies might be preferable. It questions whether there are technical or operational limitations on smaller providers, as well as a disproportionate economic impact, which might make further forbearance appropriate on a more general basis. NPR ¶ 32. The Notice seeks comment on those factors which might qualify an entity as small for these purposes. NPR ¶ 33-6. It also questions whether the particular customer base served might be used to distinguish among CMRS providers for whom further forbearance might be appropriate. NPR ¶ 37. Finally, the Commission proposes that it might extend further forbearance on a purely case-by-case basis, upon a demonstration that the statutory test would be satisfied. NPR ¶ 38.

A. The FCC Should Consider Market Dominance In Determining Appropriate Levels of SMRS Forbearance

While the Association's comments on each of the Title II provisions for which forbearance is being considered are detailed below, AMTA strongly recommends adoption of the alternative tests outlined in the Notice. The Association has already described in earlier stages of this proceeding its conviction that "small" mobile radio

providers should be excluded from the definition of CMRS, and, therefore, from any Title II obligations.[8/] AMTA would still urge the FCC to revisit its CMRS/PMRS delineation and adopt a less expansive CMRS definition. However, the Association is pleased that the FCC has emphasized in this proceeding its intention not to impose unnecessarily burdensome Title II requirements on CMRS providers. NPR ¶¶ 1,5,7,32, and Appendix A. AMTA believes this will best be accomplished if the Commission forbears from application of these provisions to "small" CMRS operators, as described more fully below, and those who serve the business community rather than individual customers. Additional forbearance might then be appropriate for other entities based on the more economically-focused analysis first outlined. All Title II obligations have a common objective: protection of the public in respect to the rates charged by and practices followed by common carriers. These requirements ensure that those with market control over services which we wish to see made broadly available to the American public do not abuse that power. It is AMTA's belief that the explosive growth in wireless communications offerings will prove a more effective monitor of marketplace activities than could any level of government oversight. The variety of competitive services and providers may ultimately obviate the need for Title II-type regulation in its entirety.

However, the industry has not yet achieved that degree of equipoise. It is populated by a mix of small and large companies with widely varying spectrum, much

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[8/] See AMTA Petition for Reconsideration, GN Docket No. 93-252, filed May 19, 1994.

less financial, resources, which have achieved vastly divergent levels of marketplace penetration. Specifically, the duopoly cellular operators currently dominate the wireless industry. Both the amount of clear, contiguous spectrum they control by government fiat and their more than ten year headstart in the marketplace enable them to exercise a controlling position vis a vis the public and potential competition.[9/] The Commission has previously noted in its Competitive Carrier proceeding that "...[i]t would defy logic and contradict the evidence available to regulate in an identical manner carriers who differ greatly in terms of their economic resources and market strengths."[10/] The Association recommends that the rules adopted in the instant proceeding reflect these differences, and thereby promote the development of a more intensely competitive CMRS marketplace in the future.

B. Forbearance is Appropriate for Small CMRS Providers and Those Serving the Business Community

The Notice seeks comments on how to define "small" for purposes of further forbearance, should that analysis be adopted. NPR ¶¶ 32-36. It questions whether the definition should focus on the size of business operation, number of channels, type of service provided, or other criteria. It also asks how to treat affiliated companies under these approaches.

For the reasons described herein, AMTA urges the FCC to forbear from applying

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[9/] The Commission has already determined that the cellular industry is not fully competitive, and has announced that it intends to study that matter further in a separate proceeding. 2nd R&O ¶¶ 194-5.

[10/] First Report and Order, CC Docket No.79-252, 85 FCC 2d 1 ¶ 56 (1980).

all but the statutorily-mandated Title II provisions on CMRS providers, other than paging operators, that serve fewer than five thousand (5,000) subscribers nationwide.[11/] This calculation would include all affiliated entities, but would not extend to facilities under management agreement. The Association recommends numbers of subscribers as the determinative factor, not because it is the only or even perhaps the most accurate barometer of market power sufficient to warrant regulatory oversight, but because it is relatively simple to report and review. The new common carrier regulatory fees will require annual payments based on this same factor, so this approach would not impose any additional administrative burden on the licensee or the FCC.[12/] Moreover, while admittedly imperfect, AMTA is satisfied that the number of customers served by an entity is a reasonable estimation of its penetration into the general marketplace as well as its ability to set prices or practices. Five thousand subscribers was selected as the cap because it appears to represent a reasonable breakpoint between the "traditional" analog SMR operator and the so-called "wide-area" systems being developed at 800 MHz to serve a broader, public rather than business-oriented, customer base.[13/] SMRs and commercial 220 MHz licensees which would fall within this exclusion typically operate

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[11/] Paging systems may be capable of serving very large numbers of subscribers on very small amounts of spectrum. While AMTA is not in a position to suggest any particular number of customers which might cause the FCC to classify a paging operator as other than small for this purpose, its proposal herein is not intended to be applied to one-way paging systems.

[12/] See Report and Order, MD Docket No. 94-19 (adopted June 3, 1994 and released June 8, 1994).

[13/] Although AMTA's analysis focuses on the reclassified CMRS providers, it believes its proposal should be applicable to all CMRS operators, except duopoly cellular licensees who currently enjoy a dominant position in this marketplace.

some relatively small number of geographically dispersed systems, none of which has sufficient spectrum to serve enough customers to exercise marketplace power or exclude competition. While even the wide-area SMR systems being implemented are encumbered at present by regulatory impediments which ensure their non-dominant status in the CMRS marketplace, the more traditional SMR has none of the indicia which would warrant application of Title II obligations.

AMTA also recommends that the FCC exercise forbearance for those providers which can demonstrate that they serve predominantly the business community, rather than individual customers, even if they exceed the five thousand subscriber figure. As the FCC has noted, traditional SMR, business radio, and the nascent 220 MHz industry have focused largely on meeting business communications requirements. NPR ¶ 37. Those types of customers are more knowledgeable about these matters and better positioned to bargain for their requirements than is the typical individual communications subscriber. The type of Title II consumer protection being considered in the Notice has not been available in the past to these customers with no known adverse impact. Given the ever increasing number of CMRS alternatives, this should be of even less concern in the future.

The Association considered, but rejected, the use of business size or number of channels for distinguishing large from small. It rejected the former because the Commission has already determined that the Small Business Administration ("SBA") definition used to establish preferences under the spectrum auction rules would be too generous for this purpose. NPR ¶ 34. The Association disagrees, but cannot refute the

Commission's reasoning on this point as none is offered. This criteria was also considered inferior as it would require entities which are not currently obligated to provide data regarding their financial status to the FCC to do so. Channel count would be administratively convenient, as noted by the FCC, but does not account for the differences among CMRS frequencies. Spectrum used by systems in the CMRS category range from narrowband paging and 220 MHz frequencies to 30 KHz cellular channels and broadband PCS. Further, the Association is reluctant to base this critical distinction on a factor which inevitably will be impacted by technological advances. As spectrum limitations continue to force the wireless community to accomplish more with less spectrum, it is not clear that number of frequencies, as opposed to total capacity, will be a relevant criterion.

AMTA urges the Commission to adopt the approach outlined above for purposes of further forbearance from Title II provisions. Should the FCC elect to proceed on a section-by-section basis, or should it use that approach for providers which do not qualify under the criteria recommended by AMTA, the following sections outline the Association's position on those individual sections.

C. The FCC Should Assess Forbearance in Accordance with the Following Section-By-Section Analyses

Section 223: Obscene, Harassing, Indecent Communications

This section imposes criminal penalties on those making obscene or harassing telephone calls, and furthers the important public policy of protecting minors from indecent communications. Section 223 impacts only those CMRS providers which may choose to offer billing and collections services to "adult information providers". Where

such services are provided, the CMRS provider must, to the extent technically feasible, block access by customer equipment to adult information providers where such access has not been requested ("reverse blocking"). NPR ¶ 12.

The Commission has tentatively concluded in both the 2nd R&O and in the NPR that it will not forbear from applying this section to CMRS providers. AMTA agrees with the Commission's conclusion. As the Commission notes, protecting minors from such communications is an important public policy; further, CMRS providers must make a business decision to offer services that would place them within the requirements of the statute. The Commission requests comment on whether CMRS providers are likely to be involved in services implicating Section 223. AMTA believes that it is highly unlikely that traditional SMR operators offering interconnected service would offer such services; these licensees generally offer "fleet-type" dispatch services to business entities, with interconnection only incidental to their primary business. They would be unlikely to even attract adult information providers as customers.

AMTA is unaware of any interest on the part of wide-area ESMR operators in providing services that would bring them within the language of this section. However, should any CMRS provider make the business decision to offer billing and collection services to adult information providers, AMTA believes it is not unreasonable for them to provide reverse blocking to their customers not requesting access to adult information services.

Section 225: Telecommunications Relay Services

As a portion of the Americans with Disabilities Act,[14/] telecommunications relay services (TRS) ensure that hearing or speech-impaired individuals can communicate by telephone with non-impaired individuals. As applied to common carriers, TRS involves two potential obligations: contributions to the TRS Fund, administered by the National Exchange Carrier Administration (NECA); and provision of TRS services by one of a number of methods.[15/]

The FCC has heretofore required all common carriers providing interstate services to contribute to the TRS Fund; common carriers providing voice transmission services have also been required to offer TRS services. Now, the Commission asks whether there are CMRS providers with offerings so specialized, or operations so small, that applying Section 225 to them would not appreciably advance the statute's goal of universal TRS service. NPR ¶ 17.

AMTA respectfully submits that "small" SMR service providers, as defined above, should be exempt from the obligation of offering TRS services. As previously explained, these operators offer primarily two-way dispatch services to businesses; the interconnection which makes them CMRS providers and common carriers under the Commission's definition is offered only incidentally. These operators do not promote their businesses as providing services to the general public, and it is unlikely that they will be called upon often, if at all, to provide telephone service to a hearing or speech-

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[14/] Pub. L. No. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[15/] See 47 U.S.C. § 225(d).

impaired member of the public.

The Association submits that the goal of universal service to the hearing-impaired will not be weakened should small SMR operators be exempted from TRS service obligations. Impaired individuals have now or will have in the future, a wide variety of publicly-offered communications services from which to choose, including several wireline services, ESMR, cellular telephone service, satellite, video, and PCS. All of these entities will likely provide TRS services.[16/] Inclusion of small, local licensees, which operate primarily in the specialized market of business dispatch services, will thus not contribute significantly, if at all, to the number of hearing or speech-impaired individuals able to communicate by telephone.

While seeking forbearance from TRS service obligations, AMTA recognizes the obligation of all communications service providers to fund TRS services under the statutory mandate. The interstate portion of small operators' services used to calculate interstate TRS payments is likely to be minimal; conversely, the reporting and filing obligations of TRS are a significant burden on these small businesses, which frequently have fewer than ten employees. AMTA anticipates that most licensees falling under its proposed definition of a small CMRS provider will be obligated to pay only the $100 minimum annually. Still, AMTA does not seek forbearance from TRS funding requirements for these licensees.

The Commission also seeks comment on whether CMRS providers would experience difficulties in interfacing with a third-party TRS provider. NPR ¶ 17. In fact,

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[16/] See 47 U.S.C. § 225(c).

technical difficulties currently do exist that prevent ESMR operators from offering an interface between TDD devices and TRS facilities. This is due to the nature of Motorola's Integrated Radio System (MIRS) technology, currently the only digital ESMR equipment available.

Unlike some cellular equipment, MIRS equipment does not produce reliable tones; therefore, "acoustic coupling", whereby a TDD user couples a tone-producing mobile device with the TDD device to send tone signals to the TRS facility, is not available. This means a hearing-impaired TDD user cannot currently use a MIRS device to communicate with a TRS facility; there is no impairment to the use of MIRS by a non-impaired individual to communicate through a TRS facility to a hearing-impaired TDD user on the other end of the conversation.

AMTA has been informed that ESMR systems will not be capable of testing tone transmission until well into 1995. Therefore, AMTA requests that the Commission not require provision of TRS services by ESMR licensees before the end of the CMRS transition period in August, 1996.

Section 226: Operator Services

The Telephone Operator Consumer Services Improvement Act (TOCSIA), codified at this section, protects consumers from unreasonable rates and anti-competitive practices by interstate telecommunications service entities providing operator services to telephone available to the public or transient users (OSPs). It also regulates "aggregators" such as hotels or other businesses which provide telephones to the public or transient users. TOCSIA requires, among other things, that OSPs identify themselves

before charging consumers for operator-assisted calls and that they do not charge for unanswered calls in most areas. Aggregators must inform consumers of any pre-subscribed OSP at their facilities and disclose that the consumer may use a different OSP.[17/]

At this time, AMTA-represented CMRS providers at 800 MHz, 900 MHz and 220 MHz neither provide operator services nor serve as aggregators; thus, this section of the Act does not currently apply to these licensees. AMTA anticipates that operator services used by customers of these services are likely to be provided by local exchange carriers (LECs), through interconnection with the PSTN. Should a large SMR entity, such as a wide-area ESMR operator, choose to provide operator services in the future, this would be a voluntary business decision. AMTA submits that those carriers which choose to provide operator services to the public should be subject to those consumer protection statutes impacting other OSPs. AMTA believes that forbearance from Section 226 is not in the public interest.

Section 227: Unsolicited Telephone Calls and Facsimile Transmissions

The Telephone Consumer Protection Act of 1991 (TCPA), codified at Section 227, restricts the transmission of various forms of unsolicited communications, including pre-recorded voice messages and facsimiles. The statute applies primarily to originators of such communications, such as telemarketers.

[17/] AMTA notes that the Commission has proposed to extend TOCSIA protection by allowing billed parties for 0+ calls to predesignate their OSP. Further Notice of Proposed Rule Making, Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77 (released June 6, 1994).

To the best of AMTA's knowledge, few, if any, 800/900 SMR or 220 MHz licensees are in the telemarketing business. Should CMRS providers make the business decision to engage in these activities, AMTA agrees with the Commission's view that consumers' privacy interests warrant evenhanded application of this statute. AMTA supports the Commission's conclusion that it should not forbear from imposing TCPA restrictions on those CMRS licensees which undertake telemarketing activities.

Section 228: Pay-per-Call Services

The Commission seeks comment on whether obligations under the Telephone Disclosure and Dispute Resolution Act (TDDRA) imposed on LECs and common carriers in general, should be extended to CMRS providers. NPR ¶ 30. Under TDDRA, LECs must provide customers a blocking option for "900", or "pay-per-call", services, and must tariff terms and conditions of blocking. Common carriers in general must not charge for "800" information services, and are restricted in their charges for collect information services. Further, they must not disconnect or interrupt service for failure to remit pay-per-call charges.

AMTA submits that imposition of LEC TDDRA obligations would constitute an unnecessary regulatory burden on CMRS providers. CMRS providers are not LECs as defined by the Commission.[18/] Further, CMRS operators provide interconnected services to their customers by connecting with the PSTN through LECs; any requested blocking of 900 services would occur at the interconnection point, a LEC switch. It

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[18/] "A telephone company that provides telephone exchange service." 47 C.F.R. § 61.3(r).

follows that the blocking requirement is best handled by the LEC, already subject to TDDRA. Finally, LEC tariff obligations under TDDRA would impose unnecessary administrative costs on CMRS providers, and run counter to the Commission's general decision not to impose tariffs on CMRS providers. 2nd R&O ¶ 177. Tariffs on such services also appear unnecessarily duplicative, since CMRS providers would look to the LECs to provide any requested blocking of pay-per-call services.

TDDRA's blocking option requirement also appears unnecessary to protect CMRS consumers. Blocking is generally provided to residential telephones, to prevent unsupervised minors or others from accessing pay-per-call services. By its very nature, CMRS is "mobile"; customers carry their equipment on their persons or in their vehicle.[19/] Thus, there is far less likelihood that users of the equipment would want or require blocking of 900 services. AMTA submits that forbearance from imposing on CMRS providers LEC requirements under TDDRA would not diminish statutory protection to the public. See NPR ¶ 31.

Concerning TDDRA obligations on common carriers in general, AMTA notes that CMRS providers do not currently provide 800 or collect information services, nor do they bill or collect for 900 service providers. Should CMRS providers make a voluntary business decision to provide such services in the future, AMTA believes it would be in the public interest to require them to comply with TDDRA obligations already imposed

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[19/] AMTA emphasizes again that traditional SMR services are provided mostly to business users for fleet-type dispatch operations. Thus, this kind of equipment is found almost exclusively in business vehicles, making consumer protection in the pay-per-call context further unnecessary.

on other providers of the same services.

V. CONCLUSION

For the reasons described, AMTA urges the Commission to proceed expeditiously to complete this transitional proceeding, consistent with the recommendations detailed herein.

CERTIFICATE OF SERVICE

I, Cheri Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 27th day of June, 1994, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing Comments to the following:

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